

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

CHIEF HARRY PARKER,

Petitioner

VS.

NO. 78-99

JAMES RANDOLPH,
WILBURN LEE PICKENS
and ISAIAH HAMILTON,

Respondents

MOTION OF RESPONDENTS, JAMES RANDOLPH AND
WILBURN LEE PICKENS FOR LEAVE TO PROCEED IN
FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Come now the respondents, James Randolph and Wilburn Lee Pickens, by and through their court appointed counsel of record below, Walter L. Evans, and moves this Honorable Court for leave to proceed in forma pauperis and appoint Walter L. Evans as counsel to represent their interests in this proceeding and in support of said motion states as follows:

1. The respondents have been incarcerated in the State of Tennessee Penitentiary at Nashville for a considerable length of time pursuant to first degree murder convictions received in the State Court in Memphis in 1972.

2. The respondents originally filed their pro se petitions for Writs of Habeas Corpus in the United States District Court of Tennessee on pauper oaths stating that they were individually without money, securities or gainful employment and were unable to hire an attorney and pay for the costs of said proceedings.

3. That on October 5, 1976, Chief Judge Bailey Brown entered an order in the United States District Court consolidating the two companion cases and appointing Walter L. Evans of Memphis, to represent respondents on their original Petitions for Writs of Habeas Corpus.

4. That as a result of Walter L. Evans' representation of and argument on behalf of said respondents, the United States District Court ruled favorably on respondents applications for Writs of Habeas Corpus and ordered their release from custody unless the State (1) retried them within a reasonable time or (2) appeal the Court's decision in which case the discharge of respondents will be stayed pending appeal.

5. That the State of Tennessee appealed the decision of the United States District Court to the Sixth Circuit Court of Appeals in Cincinnati, Ohio.

6. That Walter L. Evans, in his continuing role as counsel for respondents, filed all the necessary documents and represented said respondents to the best of his ability at great personal expense, without any compensation or prospect for the same from said respondents, James Randolph and Wilburn Lee Pickens, for said representation on appeal.

7. That on March 3, 1978 an order was entered by the United States Court of Appeals for the Sixth Circuit formally appointing, Walter L. Evans, as counsel of record for the respondents, James Randolph and Wilburn Lee Pickens.

8. That as a result of the representation by Walter L. Evans of respondents, James Randolph and Wilburn Lee Pickens, the United States Court of Appeals for the Sixth Circuit on May 19, 1978 rendered an opinion affirming the decision of the United States District Court for the Western District of Tennessee.

9. The State of Tennessee has filed a Petition for a Writ of Certiorari in this Honorable Court to review the decision of the Court of Appeals for the Sixth Circuit.

10. That the financial conditions of petitioners, James Randolph and Wilburn Pickens, have not changed since they filed their original petitions for Writs of Habeas Corpus in the District Court and they have no funds or assets or prospects for securing the same to hire an attorney to represent their interests in this proceeding.

11. That Walter L. Evans is a private attorney and member of the Bar in good standing in the Supreme Court of the State of Tennessee (having been admitted on September 5, 1968); the Bar of the United States District Court for the Western District of Tennessee, Western Division (having been admitted on March 24, 1972); and the Bar of the United States Court of Appeals for the Sixth Circuit (having been admitted on February 9, 1978).

12. That Walter L. Evans, attorney, is very familiar with all the facts, law and circumstances involved in the State's Petition for Writ of Certiorari in this Honorable Court and can best represent the interests of the respondents James Randolph and Wilburn Lee Pickens in this matter.

For all of the above mentioned reasons, the movants respectfully pray that this Honorable Court will grant leave for them to proceed in forma pauperis and appoint Walter L. Evans, as attorney of record to represent their interests in this cause.

Respectfully submitted,

JAMES RANDOLPH

by: Walter L. Evans
Walter L. Evans, Attorney

WILBURN LEE PICKENS

by: Walter L. Evans
Walter L. Evans

A F F I D A V I T

STATE OF TENNESSEE
COUNTY OF SHELBY

I, the undersigned, after being duly sworn according to law doth hereby state that I was the court-appointed attorney for the respondents, James Randolph and Wilburn Lee Pickens in the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit and that said petitioners are now incarcerated in the State Penitentiary in Nashville, Tennessee, more than two hundred miles from Memphis, affiants place of residence, and that I have personal knowledge of the information contained in the foregoing motion and the same is true to the best of my knowledge, information and belief.

Walter L. Evans
Walter L. Evans

Sworn to and subscribed before me on this 5th
day of October , 1978 .

Verni Menen
Notary Public

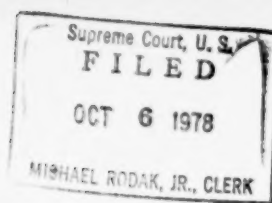
My commission expires:

May 16, 1982

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion of James Randolph and Wilburn Lee Pickens has been forwarded to Mr. Michael E. Terry, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, attorney for petitioner and Mr. Alan B. Chambers, 147 Jefferson Avenue, Memphis, Tennessee, Attorney for Respondent, Isaiah Hamilton on this 5th day of October , 1978.

Walter L. Evans
Walter L. Evans



IN THE
SUPREME COURT OF THE UNITED STATES

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CHIEF HARRY PARKER,

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VS.

NO. 78-99

JAMES RANDOLPH,
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and ISAIAH HAMILTON,

Respondents

RESPONSE AND BRIEF IN FORMA PAUPERIS OF RESPONDENTS
JAMES RANDOLPH AND WILBURN LEE PICKENS,
IN OPPOSITION TO THE STATE OF TENNESSEE'S
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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BROWN AND EVANS
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Wilburn Lee Pickens
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JAMES RANDOLPH,	*	
WILBURN LEE PICKENS	*	
and ISAIAH HAMILTON,	*	
	*	
Respondents	*	
	*	
	*	
RESPONSE AND BRIEF OF JAMES RANDOLPH AND WILBURN LEE PICKENS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit		

The Respondents, James Randolph and Wilburn Lee Pickens, respectfully pray unto this Honorable Court that the Petition for Writ of Certiorari filed by the State of Tennessee to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit on May 19, 1978, which affirmed the decision of the United States District Court, be denied so that the Writs of Habeas Corpus may promptly issue releasing them from prison or requiring the State of Tennessee to retry them within a reasonable time.

OPINIONS BELOW

The relevant decisions and opinions involved in this proceeding have been included in and attached to the Appendix of the States' Petition and Brief and are referred thereto.

JURISDICTION

The respondents admit the jurisdiction of this Court to consider issuance of the Writ of Certiorari in this case to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit correctly applied the law as stated by this Court in Bruton v. United States, 391 U.S. 123 (1968) to the facts of this case when their similar confessions were read to the jury and none of them testified.

2. Whether the Court of Appeals was correct in affirming the factual determination of the District Court that the respondent Wilburn Pickens was denied his constitutional right to counsel as enunciated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966) when his confession was taken after he contends, that he asked that his lawyer be present.

ARGUMENT

1. The Court of Appeals for the Sixth Circuit correctly interpreted the law as enunciated by this Court in Bruton v. United States and correctly applied it to the facts of this case.

2. The Federal District Court's and Sixth Circuit Court of Appeals' Determination that the record in the State Court Proceeding does not fairly support the finding that Wilburn Pickens Sixth Amendment right to counsel was not violated is correct and consistent with the principles of law set out in 28 U.S.C. §2254(d).

STATEMENT OF THE CASE

The two questions presented to this Court for review are mixed questions of fact and law.

The summary of the facts upon which the decisions in this case are based are contained in the respective opinions of Tennessee Court of Criminal Appeals (Appendix D-A-40 of State's Brief), Supreme Court of Tennessee (Appendix C-A-20), United States District Court for the Western District of Tennessee (Appendix B-A-13) and the United States Court of Appeals for the Sixth Circuit. These opinions merely recite the state's theory of the case, much of which the respondents do not agree with but will accept for purpose of this response.

These respondents also will rely upon the statements appearing on pages 7-8 of the State's Petition and Brief as constituting a summary of the history of this case.

REASONS FOR DENYING THE WRIT

Three out of the four courts which have reviewed the convictions of the three respondents have found that their (the respondents) constitutional rights were violated at trial and that their convictions should be overturned. Despite the clear findings and decisions of the Tennessee Court of Criminal Appeals, the United States District Court for the Western District of Tennessee and the United States Court of Appeals for the Sixth Circuit, the State of Tennessee has persisted in its determination to frustrate these decisions through the appellate process while the respondents continue to linger in the State Penitentiary at Nashville. Respondents deny that the State of Tennessee was surprised or "very much aggrieved by the decision of the Sixth Circuit." It is the respondents who are aggrieved by this petition and further efforts by the State to delay their inevitable release from custody and incarceration.

The decision of the Sixth Circuit is in total agreement with the conclusions of fact and law stated by Chief District Court Judge in his memorandum decision.

These two decisions underscore and are consistent with the decision of the Tennessee Court of Appeals, which not only found a violation of the Bruton rule but also an insufficient amount of evidence to warrant a conviction for felony-murder.

In more than six and one-half years only the Supreme Court of Tennessee had agreed with the State's position in this matter and even it admitted (A-37) that the major criterion for Bruton was satisfied in this case. But, because of the allegedly intertwining confessions, the Court felt that the evidence was sufficient to support the convictions, which respondents deny. Were it not but for the misinterpretation of the facts and law by the Supreme Court of Tennessee, all three of the respondents would be free today.

The basic premises upon which the State is seeking certiorari relief are without merit. The Sixth Circuit was correct in its interpretation of Bruton v. United States, 391 U.S. 123 (1968) and, comparison with Schneble v. Florida, 405 U.S. 516 (1972) and Harrington v. California, 395 U.S. 296 (1969).

The State has erroneously analogized the crucial facts of this case to Schneble and Harrington rather than Bruton because it contends, among other things, that "there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant." (Petitioners Brief, p. 9). But, neither the District Court, nor Court of Appeals, in ruling on the Bruton issue, considered the prior confession and in-court testimony of Robert Woods as having much impact on respondents convictions because of their gross inconsistency and Woods failure to positively identify respondents as being at the scene of

the shooting. Also, Robert Woods never met personally with either of the respondents prior to the incident to allegedly "plan" the robbery.

It is only in the confessions of Randolph, Pickens and Hamilton that place them at the scene of the shooting. Only the confessions of Pickens and Hamilton, however, make reference to any prior meeting with another person (Joe Woods) to "plan" the robbery.

A close examination of the confessions themselves do not disclose that Randolph and Pickens had "planned" very long before going with Hamilton to the scene of the poker game that night. Therefore, the confessions in this case, though similar in some respects, are inconsistent, illogical and secured under questionable circumstances. They do not interlock with the necessary quality for this Court to consider in resolving any possible conflict among the various circuits on the issue of "Interlocking Confessions."

The Bruton rule of exclusion was therefore properly applied to all police evidence concerning the confessions (written or oral) said to have been given by the three present petitioners, because neither one of them took the stand or was available for cross-examination by his co-defendants. There was also the absence of the other "overwhelming" evidence which existed in Harrington and Schneble.

Townsend v. Sain, 372 U.S. 293 (1963) and 28 U.S.C. §2254(d) provide the guideline and standards for conducting hearings on federal habeas corpus petitions. The Federal District Court adhered to these general requirements and concluded that the record in the State Court proceeding, considered as a whole, does not fairly support the factual determination that Pickens confession was admissible.

In considering the trial record and testimony of the witnesses (Pickens and his attorney) at the evidentiary hearing both the District Court and Sixth Circuit were convinced that he had been denied his right to counsel as stated under Miranda.

Both sides knew ahead of time that the evidentiary hearing would deal specifically with Pickens claim of denial of his right to counsel and the State elected not to call any witnesses and is now complaining about the Court's finding.

The trial court made no written finding, opinion otherwise in giving its reasons for ruling that Pickens' confession was admissible as to him. Therefore a presumption of correctness under 28 U.S.C. §2254(d), as contended by the State, does not exist. The District Court could therefore consider the trial record and evidence presented at the evidentiary hearing when the merits of a factual dispute are involved.

The Sixth Circuit affirmed the independent finding of fact and conclusions of law on this issue by the District Court, which had a rational basis and was not "clearly erroneous." See Federal Rules of Criminal Procedure, Rule 52(a).

There are therefore no special or important reasons for this Court to review this case and the writ of certiorari should not issue.

A R G U M E N T

I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY INTERPRETED THE LAW AS ENUNCIATED BY THIS COURT IN BRUTON V. UNITED STATES AND CORRECTLY APPLIED IT TO THE FACTS OF THIS CASE.

The decision of the Sixth Circuit in affirming the decision of the District Court, contains a well reasoned analysis of the case of Bruton v. United States, 391 U.S. 123 (1968) and applied it to the facts of this case. The Court left little doubt that it was convinced that the constitutional rights of the respondents were violated by the admission into evidence of their confessions without the opportunity for cross-examination. In deciding the Bruton issue the Court correctly compared and interpreted Harrington v. California, 395 U.S. 296 (1969) and Schneble v. Florida, 405 U.S. 516 (1973) and made it clear that those cases did not overrule Bruton but applied to certain specific facts not applicable to this case.

In Bruton there was a joint trial of Evans and Bruton for armed robbery of a post office. At the trial, a postal official testified that Evans orally confessed to him that Evans and Bruton committed the robbery. The Evans confession was later held inadmissible as being a violation of Miranda principles, and Evans' conviction was reversed. Evans v. U.S. 8th Cir., 1967, 275 F. 2d 355. Otherwise, the testimony against Bruton was weak (Evans, 375 F. 2d at Page 361). Evans was later re-tried and acquitted. At the joint trial, neither Bruton nor Evans testified, and the Trial Court gave the usual limiting instruction. This Court reversed Bruton's conviction, ruling that there was a "substantial risk" that the jury looked to the incriminating extrajudicial statements in

determining Bruton's guilt, and that the admission of Evans' confession in this joint trial violated Bruton's right of cross-examination secured by the Confrontation clause of the Sixth Amendment. This Court said at pages 127-128 of 391 U.S., page 1623 of 88 S. Ct:

"Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight, to the Government's case in a form not subject to cross-examination, since Evans did not take the stand . . . (emphasis added)"

This Honorable Court has never gone beyond that holding. Nelson v. O'Neil, 402 U.S. 622, 628 (1971).

Bruton teaches that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." The holding of Bruton was reiterated in Roberts v. Russell, 392 U.S. 293 (1968).

Since Bruton and Roberts this Court has made it clear, however, that a Bruton error can be harmless. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 516 (1972); Brown v. United States, 411 U.S. 223, 231, (1973).

The state in its Petition for Writ of Certiorari has liberally cited and relied upon Harrington and Schneble to persuade this Court that the Bruton rule should not apply to this case. It has, however, erroneously compared the crucial facts of this case to Harrington and Schneble rather than Bruton. The racial makeup of the parties, though similar to those in Harrington and Schneble, does not constitute that similarity of facts which is important on the question of stare decisis.

Both Harrington and Schneble stand for the proposition that a violation of the Bruton rule in the course of a trial does not require reversal, if the evidence of

guilt is "so overwhelming", that the prejudicial effect of the co-defendant's admission is so comparatively insignificant as to clearly be "harmless error". Schneble, 405 U.S., 1058-1960.

In Schneble both of the confessions of the two non-testifying defendants were consistent, corroborated by other evidence and there was a lack of contradiction in the record. In Harrington, there was other evidence implicating the defendant besides the confessions, including several eye witnesses who placed him at the scene of the crime. The Court in Harrington reaffirmed its holding in Chapman v. California, 386 U.S. 18 (1966) by saying that "before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." (See Chapman, 386 U.S. 24). The Court further stated that "we do not depart from Chapman nor do we dilute it by reference." 395 U.S. at 254.

In Chapman the Court stated that:

"In fashioning a harmless constitutional error rule, we must recognize that harmless error rules can work unfair and mischievous results when, for example, highly important and persuasive evidence or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 386 U.S. at 22.

In Harrington, this Court reminded us that the mere fact that an out of court confession is not incriminating of a co-defendant in express terms, does not mean that admission of the statement is harmless error. For the circumstances and the details of the confession may make it "as clear as pointing and shouting that the person referred to "was the co-defendant 395 U.S. at 253.

In the instant case, none of the confessing black co-defendants testified at trial or were present when the statements of the other was given. The only defendant to testify at trial was Robert Woods, a white co-defendant

who had also given a prior statement to the police, which was inconsistent with his testimony at trial (See Appellate Record 254-288). Chief District Court Judge Bailey Brown in ruling on the Bruton issue stated that:

"...Other than the confessions of these petitioners, the only other evidence of their guilt is the testimony of Robert Woods whose identification of Petitioners Randolph and Pickens was very weak. Still further, there was no proof, except in the confessions, that petitioners had been (through) Joe Woods, a part of a prearranged robbery plan, a necessary ingredient to their conviction of felony-murder; Robert Woods supplied no such proof in his testimony."
(Memorandum Decision A-13)

It is quite clear from a careful reading of the trial record (and the District Court and Sixth Circuit Court of Appeals so found) that the rights of the petitioners to confrontation and cross-examination were violated under Bruton and such violation was not "harmless error beyond a reasonable doubt."

The state seeks to establish the other "overwhelming" evidence in the record against the respondents by citing the testimony of some of the trial witnesses who said they saw "three colored men", "a white man and three blacks" and "three blacks" at the apartment door shortly after the shooting. (See State's Petition and Brief, Page 16). No witness, however, identified either of the three black respondents in Court as those "colored men" they saw at the scene. Joe Woods, who the confessions implicate as having met with the black co-defendants to plan the robbery, did not testify at trial nor make a written or oral statement to the police.

Without the confessions of the non-testifying co-defendants the government would not have been able to establish any involvement of respondents in the alleged criminal activity.

The confessions of Pickens, which is probably the more damaging of the three on the material issues, was found by both the Federal District Court and Court of Appeals to have been secured in violation of his constitutional rights. In addition, both Randolph and Pickens have consistently maintained that their statements were coerced, involuntary and not their own.

The Trial Judge instructed the jury that a statement must be voluntary to be considered as competent evidence. (State Record 942). It also instructed the jury after the reading of each confession to not consider the statements as they relate to any other defendant (Appellate Record 446-447). A careful reading of the record makes it difficult to determine what evidence the jury believed or even considered in convicting Randolph, Pickens and Hamilton of felony-murder besides their confessions.

The only statement of any pre-plans to rob the poker game is contained in the three similar statements of Randolph, Pickens and Hamilton. (See Appellate Record 445)

If only the confessions of Randolph and Pickens are considered separately and only as to the alleged confessor, then there was no evidence to corroborate any alleged meeting between Randolph, Pickens, Hamilton and Joe Woods. Robert Woods, the only one who testified, was not present at any such meeting. Joe Woods who allegedly met with the petitioners never testified, confessed or admitted any such meeting took place. But, because of the theory of the State at the trial, it was necessary to establish an alleged "agreement to rob the poker game" for there to be any reasonable chance of convicting petitioners on the other evidence they had. The confessions as in Bruton were therefore very vital to the government's case.

The State, in its brief, contends that the confessions themselves corroborate and are consistent with the State's theory of the case, and can constitute that "overwhelming evidence" talked about in Harrington and Schneble.

The confessions of Randolph, Pickens and Hamilton, though illogical and inconsistent in many respects, are essentially alike in the material details. That fact, however, should not, by itself, furnish that "overwhelming evidence" talked about in Harrington and Schneble to render a Bruton violation harmless, at least where there is a serious question concerning one of the defendants' (Pickens) statement.

The Sixth Circuit's decision addresses the issue of interlocking confessions in response to the State's contentions but does not say that these confessions interlock.

The interlocking confession theory adopted by some Circuits has been the result of efforts to determine the question of "harmless error" as applied to individual factual situations.

This theory in effect states that a Court may admit into evidence hearsay testimony depending upon the contents of said statement and how it compares favorably with other (normally) admissible evidence. Such a position disregards the basic principles of the Sixth Amendment to the United States Constitution and Bruton. Hearsay is Hearsay. It cannot be cured by saying that it is the same or similar to another statement. To reach this conclusion would be to say that because the confessions are "similar" in content and corroborate each other that they are admissible, even though neither co-defendant was present when the other gave his statement nor was able to cross-examine each other in Court.

This Court stated in Bruton that credibility and reliability of testimony and confessions of accomplices "is inevitably suspect" and this unreliability is "compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination." Bruton at p. 136-138. It is clear, that these three respondents were victims of circumstance, innuendo, involuntary statements containing untrue information. The jury after having heard all the evidence and testimony probably could not distinguish one confession from the other. They could well have rejected Robert Woods' testimony in Court in light of his prior inconsistent statement and efforts to justify his theory of self defense.

The Federal District Court and Sixth Circuit Court of Appeals for many reasons, were correct in concluding that the rights of respondents to confrontation and cross-examination were violated under the Bruton rule and that the violation was not "harmless error beyond a reasonable doubt."

II

THE FEDERAL DISTRICT COURT'S AND SIXTH CIRCUIT COURT OF APPEALS DETERMINATION THAT THE RECORD IN THE STATE COURT PROCEEDING, DOES NOT FAIRLY SUPPORT THE FINDING THAT WILBURN PICKENS' SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED IS CORRECT AND CONSISTENT WITH THE PRINCIPLES OF LAW SET OUT IN 28 U.S.C §2254(d).

The Federal District Courts have jurisdiction to decide and rule upon an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State Court on the ground that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(d). In deciding the issue, the District Court may consider the whole record of the State Court proceeding and/or hold an evidentiary hearing when the merits of a factual dispute are involved. The District Court does not have to rely solely upon the State Transcript in making its determination. Townsend v. Sain, 372 U.S. 293 (1963); Waddy v. Heer, 383 F. 2d 789, (6th Cir., 1967), certiorari denied 392 U.S. 911, 88 S. Ct. 2069. It can make its own independent finding of fact and such a finding will not be set aside on appeal unless it is "clearly erroneous." Federal Rules of Criminal Procedure, Rule 52(a), Waddy v. Heer, 383 F. 2d 789 (6th Cir., 1967).

Townsend v. Sain was the precursor of U.S.C. §2254(d), and the U.S. Supreme Court in the case set forth the following general standards, among others, governing the holding of hearings on federal habeas corpus petitions.

- (a) When an application by a state prisoner to a federal Court for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew. 372 U.S. at 310-312.

- (b) Where the facts are in dispute the Federal District Court must grant an evidentiary hearing if "... (2) the state factual determination is not fairly supported by the record as a whole, ... (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full fair fact hearing..." 372 U.S. at 313
- (c) An evidentiary hearing may also be granted when the State Court applied an incorrect standard of constitutional law, or if for any other reason, the District Court is unable to reconstruct the relevant findings of the state trier of fact. 372 U.S. at 313-316
- (d) The Federal District Court must carefully scrutinize the State Court record in order to determine whether the factual determination of the State Court are fairly supported by the record. 372 U.S. at 316

28 U.S.C §2254(d) embodies substantially the same provisions as those standards set out in Townsend. It does not provide, as implied by the state, that a factual determination made by a state court, standing alone, is entitled to a presumption of correctness in the District Court. (Petitioner's Brief, p. 23). Such presumption exists only when "... evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. §2254(d). In ruling on the voluntariness of Pickens' confession the trial court made no such written finding or opinion setting forth its reasoning or facts considered in concluding that Pickens' confession was voluntary. (p. 421, State Record).

Nowhere in the Court's ruling can it be determined whether Pickens' claim of denial of his constitutional right to counsel was considered. The Court very well could have merely ruled that the confession was not "coerced" in the traditional sense.

Supreme Court Justice Thurgood Marshall stated in his dissenting opinion in LaVallee v. Delle Rose, 410 U.S. 690, 93 S. Ct. 1203 (1973):

"It is possible, of course, that the state court rejected all of [defendant's] testimony as incredible and therefore properly held the confession voluntary. On the other hand, if the state court had believed all of [defendant's] contentions, it would undoubtedly have found the confessions involuntary. There remains, however, the third possibility that the state court believed some of [defendant's] contentions and rejected others. It is the last possibility that makes for substantial uncertainty in a factually complex case such as this as to whether the state court correctly applied the abstract legal standard and did not, instead, commit constitutional error. 410 U.S. at 700

The facts surrounding Pickens' confession are more difficult and complex than those involved in LaVallee because of the specific instruction given to Pickens a few hours before his arrest by his attorney. Even if the Court was inclined not to give full credibility to Pickens account of his confession, it must consider the testimony of Pickens' attorney, Anthony Sabella, a member of the bar and an officer of the Court, and the reasonable inferences to be drawn from such instruction in light of Pickens statements in Court that he requested, among other things, to call his attorney before making any statements to the police.

The state relies to a great extent in its brief, and seems to imply that the case of LaVallee v. Delle Rose reversed the standards set forth in Townsend v. Sain, which it did not. The LaVallee court relied upon the language from Townsend in interpreting 28 U.S.C. §2254(d) (1). It did not hold that the District Court erred in holding de novo evidentiary hearing on the voluntariness of the defendants' confession. That is a question distinct from the presumption of validity and special burden of proof established by 28 U.S.C. §2254(d), which says nothing concerning when a district judge may hold an evidentiary hearing - as opposed to acting simply on the state court - in considering a

habeas corpus petition. The question of whether such a hearing is appropriate on federal habeas corpus continues to be controlled by the Supreme Court's decision in Townsend v. Sain even after the enactment of §2254(d). See "Developments in the Law - Federal Habeas Corpus", 83 Harvard Law Review 1038, 1141 (1970).

Townsend explicitly recognized that, apart from the six specific instances described in that opinion as mandating an evidentiary hearing,

"in all other cases where the material facts are in dispute, the holding of... a hearing is in the discretion of the district judge... In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318

The District Court agreed with the Magistrate's report on reference that an evidentiary hearing was necessary to consider anew the question of the voluntariness of Pickens confession because of certain undisputed testimony in the record which is not consistent with the trial court's determination that the confession was voluntary and admissible.

Chief Judge Bailey Brown in his order of March 23, 1977, in which he dismissed certain other claims of petitioners and granted the evidentiary hearing for Pickens stated as follows:

"With respect to the claim of petitioner Pickens that his written statement should not have been admitted in evidence on the ground that it was not freely and voluntarily given and on the ground that his Miranda rights were violated in that connection, the Court is of the opinion that an evidentiary hearing is necessary and therefore, the Clerk is authorized to issue a writ of habeas corpus to obtain the presence of petitioner Pickens here for the consultation with his attorney at least four (4) days prior to the hearing, which is set for FRIDAY, APRIL 29, 1977 at 11 a.m." (Appellate Record 117).

Both sides therefore knew ahead of time that the evidentiary hearing would deal specifically with the issue of the voluntariness of Pickens confession and his request for counsel. The District Court wanted to "hear the full circumstances surrounding [Pickens'] interrogation and observe the demeanor of the witnesses involved" as recommended by the Magistrate's report. (Appellate Record 166).

It was obvious that the only witnesses the petitioner Pickens could expect to call to testify on his behalf at the evidentiary hearing was himself and Attorney Sabella, who represented him at the trial. This he did. On the other hand, the state refused to call any witnesses for the evidentiary hearing and elected to rely upon the testimony of the state witnesses in the trial court. (Appellate Record 80-82). Under Townsend v. Sain, either party may choose to rely solely upon the evidence contained in the state record (372 U.S., at 322), which the State did in this case.

The respondent had no obligation nor responsibility to call any of the state witnesses for the evidentiary hearing (as suggested in Petitioners' Brief, Page 22) where the state chose simply to rely on the state transcript. (Petitioners' Brief, p. 23).

The Court, therefore, had the opportunity to personally observe the demeanor and testimony of Pickens and Attorney Sabella and consider them in light of the state transcript. And based on the state's position, the Court had to assume that if the state witnesses were present, they would testify substantially the same as they did in the trial Court.

The testimony of Pickens and Sabella at the evidentiary hearing was substantially the same as at trial. And, the District Court inquired of them further into the basis for certain of their statements to resolve certain crucial questions surrounding Pickens request for counsel and his confession. The following facts were undisputed:

1. Sabella had represented Pickens a short time before his arrest on another charge.
2. On the day prior to his arrest, Pickens' picture appeared in a local newspaper along with others, with a story saying that he was wanted for the Douglas murder.
3. Pickens saw his picture and called his lawyer, Mr. Sabella, that same evening and asked him to accompany him (Pickens) to the police station to turn himself in.
4. Attorney Sabella had also seen the picture and story before Pickens called.
5. Sabella told Pickens that he could not go with him that evening and asked Pickens to come to his office the next morning and he would surrender him to the police.
6. Sabella also told Pickens that if, in the meantime, he were arrested, he must advise the police that Sabella was his lawyer and that he wanted his lawyer present for any questioning.
7. Pickens was arrested in the very early hours of the next morning and signed a confession before his attorney was contacted. (Appellate Record 18).

It was also undisputed that Pickens was nearsighted and could not read small print and did not have his glasses with him when he signed the written confession. (Appellate Record 373, 374, 362, 368, 38, 86-88).

Pickens testified in both the state court and at the evidentiary hearing that he told the police more than once that Sabella was his lawyer and wanted to contact him but the police denied him the opportunity. The police, on the other hand, testified in state court that Pickens never asked for a lawyer or mentioned his attorney, Sabella.

The Court had to resolve this factual dispute based on the whole record, not just the testimony of Pickens and Sabella at the evidentiary hearing and held as follows:

"We are satisfied, therefore, that [the state court] record does not support the finding that Pickens did not ask for access to his lawyer and on the contrary that the evidence is convincing that he did ask for access to his lawyer. 28 U.S.C.A. §2254(d)

We, therefore, conclude that the admission in evidence of Pickens' confession was a constitutional error in that it violated his right as set out in Miranda." (Memorandum Decision, A-17).

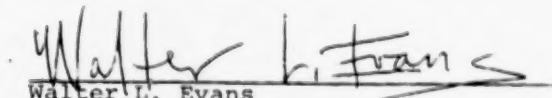
In arriving at its conclusion the District Court also considered the testimony of the police officers at trial and stated that they "...were testifying about, to them, a routine event eighteen months after the event." (A-17) The police's version of the facts regarding Pickens' interrogation was "practically inconceivable" and so unbelievable that the Chief District Judge could not find sufficient other evidence in the record to justify the trial Court's finding that Pickens' confession was voluntary.

Thus, the District Court found as a fact from the testimony heard at the evidentiary hearing and the review of the transcript of the state court proceeding, that Pickens requested his attorney prior to giving his confession and was denied such in violation of his Sixth Amendment Constitutional right to counsel as set forth in the case of Miranda v. State of Arizona, 384 U.S. 436 (1966). The finding of fact and conclusions of law on this issue were affirmed in total by the Court of Appeals for the Sixth Circuit.

CONCLUSION

For all of the above reasons the respondents, James Randolph and Wilburn Lee Pickens pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that two (2) true and exact copies of this Response of Respondents James Randolph and Wilburn Lee Pickens have been served on Michael E. Terry, Assistant Attorney General, State of Tennessee and Alan E. Chambers, Attorney for Appellee, Isaiah Hamilton by mailing the same addressed to their offices, postage prepaid on this 5TH day of October, 1978.

